NO. 5624

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

JOHN VERNON QUARLES and HOPE VIRGINIA FINN, Appellants,

vs.

THE CITIZENS NATIONAL BANK OF SALMON, IDAHO, a Corporation, Appellee.

Brief On Behalf of Appellee

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

JONES, POMEROY & JONES, and E. H. CASTERLIN,

Residence: Pocatello, Idaho, and Salmon, Idaho, respectively.
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INDEX

TABLE OF CASES

TEXT BOOK CITED

STATUTES CITED

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STATEMENT OF THE CASE.

On April 15, 1922, appellee, Citizens National Bank of Salmon, Idaho, hereinafter called the Bank, commenced suit in the District Court of the Sixth Judicial District of the State of Idaho, of Lemhi County, against G. B. Quarles, to recover on a promissory note dated December 28, 1921, for $4,556.99, with interest at 10% per annum from date, payable on demand. Summons and writ of attachment were duly issued in said cause on April 15, 1922, and on April 17, 1922, pursuant to said writ of attachment, the Sheriff of Lemhi County, Idaho, acting by himself and through his deputy, J. L. Kirtly, (deceased since May 19, 1924,) levied on a certain wool warehouse, along with other property belonging to the defendant, G. B. Quarles, by serving on the defendant, then in possession thereof, a copy of complaint, summons and writ of attachment, together with a notice that the wool warehouse, describing it, was attached (Rec.

pp. 53, 65-69). At the time of said attachment, the Sheriff, through his deputy Kirtly, appointed H. G. King, custodian of the warehouse and gave him a key to the same (Rec. p. 60). King continued to act in such capacity until after the property was sold to the Bank under execution sale (Rec. p. 63). The wool warehouse was built on the right-of-way of the G. & P. Railway Company, and was 80 feet by 48 feet in size, exclusive of platform, and built on concrete piers (Rec. pp. 20 & 50). At the time of the attachment there was no written lease for the land upon which the warehouse was located.

There is no dispute that the said wool warehouse is personal property and the size and description establishes the fact that the same was incapable of manual delivery at the time of said levy of attachment.

Subsequent to the levy of said attachment and on July 14, 1922, G. B. Quarles in person, made and filed a motion in the action in which said attachment was issued, to discharge the wool warehouse from the lien of the attachment on the ground that the amount of property attached was excessive, which motion contains, among other matters, the following recitals:

"The Sheriff reports to have levied upon as personal property that certain wool warehouse which is the property of the defendant; that the writ was levied April 17, 1922, and that the time has lapsed within which other creditors could procure judgments and pro rate in the proceeds of the sale of the attached property; that the defendant moves that all of the property so attached with the exception of 185 shares of stock of the Citizens National Bank, be discharged from the lien of the attachment and that the discharge be established of record except as to said stock (Rec. pp. 65-66)."

Thereafter, on the 28th day of July, 1922, an order was made by the District Judge denying said motion to discharge the attachment, and no appeal was taken from said order (Rec. p. 66).

On October 2, 1922, judgment was entered against the defendant, G. B. Quarles, from which no appeal was taken. Thereafter, on the 15th day of January, 1923, a writ of execution was issued out of the said District Court in the said case of Citizens National Bank against G. B. Quarles, directed to the Sheriff of Lemhi County, an containing, among other matters, the following recitals:

"That it is based upon a judgment for $5,291.38 entered in said case on October 2, 1922, all of which is unpaid; that the following described property as well as other property was attached on April 15, 1922, all right, title and interest of G. B. Quarles in and to said wool warehouse; commanding the said Sheriff to sell the said property to satisfy said judgment."

And pursuant to said writ of execution, on said judgment, and on the 22nd day of January, 1923, the wool warehouse was sold to the Bank (Rec. pp. 66-67), which immediately took possession and has since retained exclusive control thereof. On May 1, 1923, the Gilmore & Pittburgh Railroad Company leased to the Bank the site of the warehouse which lease was in effect until April 30, 1928, the annual rental being $50.00 (Plaintiff's Ex. F & G; Defendant's Ex. 1 and the lease and receipt attached).

On May 29, 1922, this being subsequent to levy of attachment and prior to motion to discharge warehouse from said attachment, the same G. B. Quarles, made his note dated that day, in favor of John Vernon Quarles and Hope Vir-

ginia Quarles, his children by a former wife, named Hope McCaleb Quarles, for $4,490.88, with interest at 7 per cent per annum from date, payable on demand. John Vernon was born October 14, 1903, and Hope Virginia was born July 26, 1907. On May 31, 1922, both children being then over the age of 14 years, H. L. McCaleb, a brother of Hope McCaleb Quarles, together with G. B. Quarles, filed a petition in the District Court of Lemhi County to appoint H. L. McCaleb guardian ad litem for the purpose of bringing suit on the note. The petition, among other things, recited:

"That heretofore the Citizens National Bank of Salmon, Idaho, commenced an action in this Court against the said G. B. Quarles, and caused to be issued out of this Court a writ of attachment against the property of the said G. B. Quarles; that it is doubtful whether on sale of the said property so attached it will sell for sufficient to pay all the debts of said G. B. Quarles, and it is therefore necessary to commence this action and prosecute the same to judgment within sixty days from the date of said attachment in order that the said creditors, John Vernon Quarles and Hope Virginia Quarles, may share in the proceeds of the sale of the attached property." (Ex. E, and Rec. p. 64.)

On the same day an order was made appointing H. L. McCaleb guardian ad litem of John Vernon Quarles and Hope Virginia Quarles, and the said guardian ad litem on the same day filed a complaint on the note given by G. B. Quarles to his children, in the District Court of Lemhi County, against G. B. Quarles, who appeared by general demurrer without service of summons, and the demurrer was overruled, and defendant announced in open Court that he would not plead further; whereupon the default of the defendant was entered and the plaintiff secured judgment (Ex. E, Rec. p. 53), on said note against G. B. Quarles. These proceedings were all taken on the same day.

On the following day, June 1, 1922, Quarles executed a chattel mortgage to H. L. McCaleb on the wool warehouse and other property to secure the payment of the judgment, which mortgage specifically provides that it is given as additional security to any security that might exist by reason of the judgment lien on real estate and that it "does not waive the right of the judgment creditor of the said G. B. Quarles to share in the proceeds of the sale of any attached property, attached in the suit of the Citizens National Bank against the said G. B. Quarles" (Rec. pp. 20, 53-65).

On September 21, 1922, the mortgagee McCaleb commenced summary foreclosure of said chattel mortgage, the affidavit in foreclosure and notice of sale were placed in the hands of T. J. Stroud, Sheriff, who served the same on G. B. Quarles, and in furtherance of the foreclosure proceedings the Sheriff appointed one, Frank H. Haveman, as keeper, subject and subordinate, however, to the duties of H. G. King as custodian of the warehouse under the attachment proceedings, it being testified by the Sheriff that at the time he served the foreclosure papers on Quarles he already had peaceable possession of the warehouse under the writ of attachment and whatever was done was subject to the writ of attachment (Rec. p. 71).

The Sheriff proceeded under the foreclosure proceedings to sell all right, title or interest of G. B. Quarles in and to the warehouse and the same was struck off to Rose Loring Quarles, the wife of G. B. Quarles, on September 30, 1922, for $25.00. The Sheriff's return on foreclosure, the Sheriff's certificate of sale, the bill of sale from Rose Loring Quarles, and the bill of sale from Rose Loring Quarles and G. B. Quarles to the children, all state that she was the purchaser. On September 11, 1925, Rose Loring Quarles made and delivered her bill of sale to John Vernon Quarles, con-

veying all of her title to said warehouse; and on June 28, 1926, Rose Loring and G. B. Quarles made and delivered their joint bill of sale conveying to John Vernon Quarles and Hope Virginia Finn, all of their title (Ex. E, C, D, B.).

The plaintiffs commenced this action on July 7, 1926, for the purpose of obtaining judgment decreeing, that the attachment levied by the Citizens National Bank on April 17, 1922, was void as against said warehouse; that the mortgage from Quarles to McCaleb was first and prior lien against the wool warehouse; that the foreclosure vested in Rose Loring Quarles a good and valid title to said warehouse; that the execution sale of said warehouse to the Bank transferred no right therein to the Bank; to obtain an accounting of the income of the property, and further to obtain a decree quieting title in and to said property in the plaintiffs (Rec. pp. 7-19).

The material allegations of plaintiffs' complaint are put in issue by the answer of the defendant, Rec. pp. 24-44, and the defendant set up by way of additional and separate defenses:

1. That at the time the chattel mortgage was given, the warehouse was in the custody of the law under and by virtue of the writ of attachment which had been levied against it by the defendant and was so held until the said property was sold under execution to the defendant (Rec. pp. 36-37).

2. That the judgment obtained against Quarles by McCaleb, guardian ad litem, and the chattel mortgage which was given to McCaleb in his individual capacity, was had and done for the purpose of defrauding the creditors of Quarles, particularly this defendant; that said mortgage was made in contemplation of bankruptcy and said judgment and mortgage were not made in good faith for a con-

sideration, but was done with the intent to delay and defraud creditors; that all of the acts set forth in defendant's second separate defense were done collusively by the relatives of these plaintiffs in fraud of the rights of the creditors (Rec. pp. 37-38-39). (In this connection the records show that said G. B. Quarles took bankruptcy on October 16, 1922 (Rec. p. 13), which was just four and one-half months from the date he executed said chattel mortgage.)

3. That on account of the matters and things set out in the separate defense of the defendant (Rec. pp. 40-44), plaintiffs waived any right to assert that said attachment was invalid and are estopped to assert that they had a lien by virtue of said alleged mortgage on said warehouse, except a lien subject and subordinate to defendant's attachment and are estopped to question the validity of the defendant's levy under said attachment.

The defendant also pleaded the Statutes of Limitations as against the right of the plaintiffs to bring this action upon the issues thus formed. The Court held that the action was not barred by the Statute of Limitations but decided that the defendant's writ of atatchment was legally levied and constituted a prior lien against the warehouse to plaintiffs' claim and ordered a decree of dismissal in favor of the defendant (Rec. p. 106). The question presented on this appeal involves the validity of the attachment levied by the appellee Citizens National Bank on the warehouse.

BRIEF OF THE ARGUMENT.

Personal property incapable of manual delivery is attached by leaving with the person having in his possession said personal property a copy of the writ of attachment together with a notice that the property is attached in pursuance to such writ.

Subdivision 5, *section* 6784, *Idaho Compiled Statutes.*

The warehouse in question is personal property incapable of manual delivery within the meaning of sub-division 5, section 6784 of the Idaho Compiled Statutes.

38 *C. J. page* 961;

Blacks Law Dictionary, Second Edition, page 757;

Irilarry vs. Byers, (*Cal.*) 257 *Pac.* 540.

The warehouse in question was validly attached.

Irilarry vs. Byers, (*Cal.*) 257 *Pac.* 540;

Rudolph vs. Saunders, (*Cal.*) 111 *Cal.* 233, 43 *Pac.* 619;

Raventas vs. Green, 57 Cal. 254, Book 19 Pac. State Repts.;

Cardenas vs. Miller, (Cal.) 39 Pac. 783;

Hall vs. Carney, 140 Mass. 131, 3 N. E. 14;

Laughlin vs. Reed, 89 Me. 226, 36 A. 130;

6 *C. J.,* page 228, section 432;

17 *Ruling Case Law,* section 78, page 181;

Eisenbud vs. Crancimino, 69 N. Y. S. 672;

Jongewaard vs. Gesquire, 199 N. W. 585 (N. D.);

Lindsey vs. Mexican Crude Rubber Co., 197 Fed. 775;

Leo vs. Maxwell, 1 Head (Tenn.) 365;
Tafts vs. Manlove, 14 Cal. 47;
Young vs. Walker, 12 N. H. 502;
31 *C. J.,* page 1013, section 55.

ARGUMENT.

Under Specifications of Error numbers 2 and 4, it is claimed by the appellants that the Court erred in holding that the wool warehouse in question is personal property not capable of manual delivery. It is conceded on both sides that the wool warehouse is personal property, but it is contended on the part of the appellants that the same is capable of manual delivery. This contention of appellants is not supported by any authorities and the only argument urged in behalf thereof, so far as we are able to ascertain from appellants' brief, is the bold statement found at the bottom of page 30, wherein it is said, "there is absolutely nothing in this record to indicate that this warehouse is of such a character that it is not capable of manual delivery."

In determining whether there is any merit to the contention of appellants we call this Honorable Court's attention to the nature and size of the wool warehouse in question. G. B. Quarles, witness for the appellants, testified that the size of the warehouse is 80 by 48 feet exclusive of a platform on the outside, which is 8 by 48 feet, and is built on concrete piers (Rec. p. 50). Exhibit "A" attached to plaintiffs Bill of Complaint (Rec. p. 20), discloses that the wool warehouse was a frame structure, sides and roof of iron and concrete foundation. This evidence is undisputed. It is at once apparent that the size and character of the building demonstrates that the property in question was not capable of manual delivery.

It may be well at this point to review briefly the authorities cited by appellants for the purpose of showing that they have no application to the instant case. All the cases cited by appellants in their behalf clearly involve the attachment of property which was capable of manual delivery with the exception of the cases of, Crisman vs. Dorsey (Colo.), 21 Pac. 920, and Throop vs. Maiden (Kan.), 34 Pac. 801, which will be discussed later in this brief.

The case of Hollister vs. Goodale involves the attachment of a four wheel carriage, known as a barouche.

In the case of Dutertre vs. Driard, (Cal.) 7 Cal. 549, the subject matter of the attachment was furniture in a restaurant.

Herron vs. Hughes, 25 Cal. 555, 563, was the case of an attachment of certain boots and shoes which the Constable never saw nor took into his possession.

In the case of Smart vs. Sosey, (Cal.) 193, Pac. 167, the property consisted of soap, soap cans and a Ford automobile, which were of a readily movable character and so declared in the case of Irilarry vs. Byers, (Cal.) 257 Pac. 541.

The case of American Fruit Growers, Inc., vs. Walmstead, 44 Ida. 786, 260 Pac. 168, involves the validity of an attachment on four thousand potato sacks. The Court held "in case of tangible property susceptible of manual seizure and delivery such property must be actually seized and taken into possession."

In Green vs. Hopper, (Nev.) 167 Pac. 23, the facts disclose that an attachment was levied against some machinery on June 4, 1914; thereafter, on June 14th, of the same year,

pursuant to a motion, the Court discharged the attachment; on the same day in which the order discharging the attachment was made the Sheriff delivered the property to the defendant, Hopper, and took a receipt from him and never again attempted to take control or possession of said property; subsequent thereto the defendant mortgaged said property and thereafter, on July 18, 1914, the plaintiff perfected his appeal from the order discharging the attachment and at the same time obtained from the Judge who made the order discharging the attachment an order staying the operation of the order discharging said attachment. Held: Where the Court dissolved an attachment of personal property and the attaching officer immediately delivered it over to the debtor and took his receipt therefor, the Court's order was executed and the subsequent appeal and bond staying the execution of the order was ineffective, and the debtor might thereafter dispose of the property as he saw fit.

We are unable to see wherein this case has any application to the case at bar for the reason that in the instant case no discharge of the attachment was made by the Court but on the other hand an order was made denying the release of the wool warehouse from the attachment.

An examination of the above cases which have been cited and quoted from by Appellants in their brief will disclose that the subject matter of the attachment in each instance involved personal property capable of manual delivery and are not in point for the reason that the subject matter involved in this case consisted of property clearly incapable of manual delivery.

Before reviewing the case of Crisman vs. Dorsey, cited and relied upon by Appellants in their brief in support of

their contention that the warehouse involved in this action is personal property capable of manual delivery, it is deemed advisable to point out the difference in the wording of the Idaho Statute in question, and the Colorado Statute upon which the Crisman vs. Dorsey case is based. Section 6784, Subdivision 5 of the Idaho Compiled Statutes, is as follows:

> "Debts and credits and other personal property not capable of manual delivery must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits or other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits or other personal property in his possession or under his control, belonging to the defendants, are attached in pursuance of such writ."

The above quoted Statute is the only one in Idaho dealing with the attachment of personal property incapable of manual delivery.

Subdivision 2, of the Colorado Statute, as quoted in the case of Crisman vs. Dorsey, reads as follows:

> "Debts, credits, *and other things in action,* which are not capable of manual delivery, shall be attached by leaving with the person owing such debts or with his agent, a copy of the writ of attachment, etc."
> (Italics ours.)

It is claimed by Appellants in their third specification of error that the Court erred in deciding that the Idaho Statute above quoted applies to the warehouse involved in this action and contend that the above statute only applies to, debts, credits and intangible personal property. In support of this contention the Appellants rely upon the case of Crisman vs. Dorsey, 21 Pac. 920, from which they quote quite extensively.

It will thus be observed that there is a vast difference in the wording of the Colorado Statute and the Idaho Statute. The Idaho Statute above quoted reads, "Debts and credits *and other personal property not capable of manual delivery,* etc." (Italics ours.) It will be observed that in the Colorado Statute no mention is made of, other personal property incapable of manual delivery, but the words, *and other things in action,* are used after the words debts and credits, which are not capable of manual delivery, whereas in the Idaho Statute after the words debts and credits it specifically mentions, *and other personal property not capable of manual delivery.* (Italics ours.)

It will thus be seen that there is a vital difference in the wording of the two Statutes and that the case of Crisman vs. Dorsey based upon the Colorado Statute lends no support to the Appellants contention as to the construction of the Idaho Statute.

In the other case relied upon by the Appellants, viz, Throop vs. Maiden, 34 Pac. 801, which involved the validity of an attachment of forty acres of corn. The officer went to the field on October 9th, and declared a levy upon forty acres of corn standing therein and caused it to be appraised. He delivered a copy of the order to the defendant and informed him that he had levied upon and was going to hold custody of the corn. He then left the field and did not return to or exercise any dominion over the property levied upon until December 3, 1889, when he came back to advertise a proposed sale. He not only did not retain possession of the corn but he failed to put in charge or keeping of another for him and no notice was posted that a seizure had been made or that possession was claimed by virtue of an attachment lien. Held: That the levy of attachment insufficient.

It will be observed in this case that if there was any Statute in the State of Kansas similar to the Idaho Statute above quoted, that no attempt was made to levy upon the corn in accordance therewith, and that no one was appointed as custodian, or that no notice was posted that a seizure had been made or that possession was claimed by virtue of the attachment. This case can throw no light upon the construction of the Statutes of Idaho and involves such a different state of facts that it is, as we view it, not in point.

Appellants on page 19 of their brief quote verbatin from 6 C. J. page 223. The general rule therein stated respecting a levy on personal property should in view of the nature of the property in this case be read in connection with the principle of law set out in 6 C. J. page 228, Sec. 432, etc., wherein it is stated:

> "Where property is incapable or difficult of manual delivery, the officer may not be required to take actual possession thereof, but some notorious act as nearly equivalent to actual seizure as practical must be substituted, and such steps taken as will fasten the property in the hands of the person who has possession or control, to await the judgment in the case, or such person must be required to place it in the hands of the Court. Some statutes prescribe that a levy upon such personalty is to be made by delivering a copy of the writ or order, with a notice specifying the property attached, to the person holding the same or to his authorized agent, while others provide that a certified copy of the writ and of the return may, within a certain time, be deposited in a specified office, and that such attachment shall then be as valid as if the articles had been retained by the officer."

Upon this same question in 17 R. C. L., Sec. 78, page 181, the law is stated as follows:

> "It should be observed, however, that although there

> are many cases in which executions or attachments have been sustained, where the property, though personal, was not reduced to the actual possession of the officer, such as the attachment of blocks of granite, a house on another person's land, a barn full of hay, etc., these decisions were in the main not intended to disturb the law requiring an officer to take possession of personal property, but were merely relaxations of the rule on the subject, owing to the ponderous and bulky nature of the property to be attached; *and to meet such cases, adequate provision is now very generally made in the statutes of the several jurisdictions.*" (Italics ours.)

In support of the decision of the Court that the warehouse in question was personal property incapable of manual delivery and that attachment thereon was legally levied, we shall first consider what is meant by manual delivery. Manual delivery means:

> "Delivery of personal property sold, donated, mortgaged, etc., by passing it into the 'hand' of the purchaser or transferee, that is, by an actual and corporeal change of possession."
>
> 38 *C. J.* page 961; *Blacks Law Dictionary,* Second Edition, page 757; *Irilarry vs. Byers,* 257 Pac. 540.

The Supreme Court of California, in a recent decision in the case of Irilarry vs. Byers, 257 Pac. 540, construed section 542, subdivision 5 of the Code of Civil Procedure of California, which reads as follows:

> "Debts and credits and other personal property, not capable of manual delivery, must be attached by leaving with the person owing such debts, or having in his possession, or under his control, such credits and other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his

possession, or under his control, belonging to the defendant, are attached in pursuance of such writ, except in the case of attachment of growing crops, a copy of the writ together with a description of the property attached, and a notice that it is attached, shall be recorded the same as in the attachment of real property."

The California Statute above quoted is identical with 6784, Subdivision 5 of Idaho Compiled Statutes, except that it now contains an additional requirement with respect to the attachment of growing crops. The necessity of having a notice of the attachment recorded does not apply to any other class of property incapable of manual delivery.

The case of Irilarry vs. Byers, 257 Pac. 540, above referred to, involved the attachment, among other things, of a steam shovel, and in construing the California statute above quoted, in that case the Court said:

"There is no necessity for an actual handling of heavy and unmanageable articles to levy or maintain an attachment. Dreisbach v. Braden, 40 Cal. App. 407, 181 P. 262. The mere service of a writ upon the defendant, as in the case of attachment of real estate, is sufficient. Rudolph v. Saunders, 111 Cal. 233, 43 P. 619. It is not requisite to the attachment of personal property not capable of manual delivery that it be taken into custody by the sheriff, nor that, having been taken by him, his possession be retained. Code Civ. Proc., Sec. 542, subd. 5. It is obvious that, as the evidence shows this steam shovel to have been situated, it was not then capable of manual delivery."

It is contended by Appellants in their brief on page 32 and the top of page 33, that the case of Rudolph vs. Saunders, 111 Cal. 233, 43 Pac. 619, cited by the Trial Court as supporting his opinion, lends absolutely no support to the views adopted by the Trial Court for the reason that the

property involved in that question was a growing crop, and that the California Statute is different from the Idaho Statute with reference to the attachment of this class of property.

The case of Rudolph vs. Saunders, Supra, was decided in 1896, at which time the California Statute had not been amended so as to require the notice of the attachment in the matter of growing crops to be recorded. The decision contains the Statute as it existed at that time, which was identical with the Statute of Idaho at this time, and in this case the Court said:

> "It is true, the return states that defendant attached the property 'taking in my possession'; but the property, being a growing crop, not capable of manual delivery could only be attached by service of the writ and a notice as provided by Subdivision 5, Section 542, Code of Civil Procedure."

Again in the case of Raventas vs. Green, 57 (Cal.) 254, Pac. St. Reps. Book 19, the Supreme Court of California was called upon to construe Section 542, Subdivision 5 of the Code of Civil Procedure of California, which Statue at that time is identical with Section 6784, Subdivision 5 of the Idaho Compiled Statute. A brief statement of the facts in this case are as follows:

> One, McClellan had leased a tract of land on which he had a growing crop of unripe grain; action was commenced against him for the recovery of a money demand in which action a writ of attachment was issued and levied by the Sheriff on the growing crop, afterwards McClellan executed to the assignor of the plaintiffs, who had notice of the attachment, a chattel mortgage on the crop. When the crop matured the Sheriff holding the writ reaped it and subsequently under an execution issued in the action against McClellan, sold

it. The holders of the chattel mortgage then brought suit to recover of defendants the crop or its value.

It was contended by the appellants, plaintiffs in the Court below:

First, that an unripe growing crop is not the subject of attachment; Second, if so, that there was no valid attachment in the case, and Third, that if this be true that the lien of attachment was abandoned.

It was held in this case that an unripe crop of grain is subject to attachment and is personal property not capable of manual delivery. And in this case the Court says further:

"The purpose of the Statute was, as its language indicates, to declare the manner in which property subject to attachment should be attached; and with respect to personal property provide that such property when capable of manual delivery must be attached by the officer taking it into his custody; but that where not capable of manual delivery, must be attached by leaving with the person having it in his possession or under his control, or with his agent, a copy of the writ and a notice that it is attached in pursuance of such writ. Personal property not capable of manual delivery, which is in the hands of the defendant to the attachment suit, is as much liable to the attachment as if in the hands of a third person. Yet we are asked by appellants so to construe Section 542 as to exempt such property from attachment, when it is in possession of the defendant himself. A construction which would lead to such a result cannot be adopted."

See also, Cardenas vs. Miller, (Cal.) 39 Pac. 783.

In the case of Hall vs. Carney, 140 Mass. 131, 3 N. E. 14, an action was brought by Deputy Sheriff to recover of a Constable for conversion of a passenger car. Plaintiff, a Deputy Sheriff, having in his hands for service

a writ against railroad company, made demand upon the president and superintendent thereof for property other than a railroad car upon which to make an attachment, but none furnished, upon which refusal to comply with said request plaintiff went with his writ to a passenger car, part of the rolling stock of said R. R. with intent to attach the same as personal property, declared that he attached the car, and told conductor to run it off upon a siding, and upon the latter's assent, went away, leaving no keeper in charge of the car. Conductor did not do as he agreed, but made a trip with it to the other end of the line, where about one hour later it was taken possession of by the defendant, a Constable, who under tort to attach it on another writ and who retained possession personally or by a keeper until it was sold by him. It also appeared that plaintiff, four hours after defendant's attempted levy, deposited in the office of the Town Clerk an attested copy of his writ and so much of the return as related to the car, and afterward returned the writ to the Court, certifying said demand, refusal and seizure.

Held: Railroad cars are, for the purpose of attachment, personal property. It is not necessary for an officer in attaching such property to take possession of the same personally or by a keeper, to preserve the attachment. Attachment by plaintiff was in compliance with the Statute and sufficient.

Appellants contend that the evidence is unsatisfactory as to the service of a copy of the writ and notice of attachment being served upon the defendant, G. B. Quarles. In answer to this statement we desire to call the Court's attention to the fact that G. B. Quarles testified that they served upon him, a copy of the complaint, a copy of the summons, a copy of the writ of attachment, and a notice that certain property was attached (Rec. pp. 53 and 54), and he further testified that the wool warehouse in question was specified upon the notice of attachment which was served upon him

(Rec. p. 56). Appellants further contend that the Sheriff admits that he does not know whether the notice of attachment was served.

Mr. Stroud testified:

"I was Sheriff of Lemhi Cuonty during the years 1922 and 1923; during said time a levy of attachment in the case of Citizens National Bank vs. G. B. Quarles was made by my office; J. L. Kirtley, who was Deputy Sheriff at that time, served the papers. I did not personally serve or levy any Writs of Attachment in that case. I always went over the papers and attachments in cases of this kind before they left the office."

On cross examination by counsel for defendant the witness T. J. Stroud testified:

"I went over the papers in the office in the case in question before they were served. Mr. Kirtley prepared the papers and after they were prepared I went over them. A summons, attachment and notice of attachment were given to Mr. Kirtley to serve. The notice was to the effect that certain property is attached—the warehouse. I don't find a copy of the Notice of Attachment that was to be served upon Mr. Quarles attached to plaintiff's Exhibit 'G'. There is one thing I would like to have understood; when these papers were returned I wouldn't say the notice was attached to the writ, but it left the office to be served upon Mr. Quarles. I went over the matter of the service of the papers with Mr. Kirtley. When Mr. Kirtley came back he gave me a list of the papers that were served and he copied them on the Day Book and I copied them on the Attorney's Record, all papers that were served in the case. I made a charge on my book for a Notice of Attachment, that the

warehouse was attached. It will appear on my book in the charge I made for the copies. I don't think that I instructed Mr. Kirtley to serve the notice that the wool warehouse was attached, upon Mr. Quarles, along with the Writ of Attachment, as Mr. Kirtley knew. Mr. Kirtley had served papers a great many times during that time. I instructed him to be careful about serving papers in the case. When Mr. Kirtley came back after serving the papers he did not have in his possession the notice that was to be served upon Mr. Quarles. Mr. Kirtley is now dead. When Mr. Kirtley left the office to serve these papers he took with him the original notice that the warehouse was to be attached. When he returned he did not have the original. Mr. Kirtley told me that he served the papers on Mr. Quarles and he gave me a list of them and this list included a copy of the Writ of Attachment and a copy of the notice to Mr. Quarles that the wool warehouse in his possession was attached by virtue of the Writ."

When this evidence is taken in connection with the fact that Mr. Quarles admitted that he was served with a notice that the warehouse was attached, it is submitted that the Court was amply justified in finding that a notice that the warehouse in question was attached in pursuance of the writ of attachment (Rec. p. 103). In this connection it must be borne in mind that defendant himself must have been cognizant of the fact that the warehouse had been attached as is evidenced by the fact that after the attachment was made, Quarles, together with H. L. McCaleb, set out in the application for the appointment of a Guardian ad litem, that the Citizens National Bank of Salmon, in an action commenced against G. B. Quarles, caused to be issued a writ of attachment against the property of Quarles, and that it was doubtful whether the sale of said property so attached would be sufficient to pay all the debts of G. B. Quarles and

that it was necessary to commence an action against him in behalf of his children in order that they may pro-rate in the proceeds under the sale of the attached property (Ex. "E" Rec. p. 64), and the further fact that the chattel mortgage in question, upon which Appellants rely, contained a clause that the mortgagee did not waive the right of the judgment creditor of said G. B. Quarles to share in the proceeds of the sale of the attached property (Rec. pp. 20, 21, 53 and 65), and the further fact that upon the motion made for the discharge of certain property from the attachment subsequent to the giving of this chattel mortgage the said G. B. Quarles set forth in said motion, in effect, that the Sheriff reported to have levied upon the warehouse in question and that the time had lapsed in which other creditors could procure judgments and pro-rate in the proceeds of the attached property (Rec. pp. 65, 66).

We do not believe the Appellants seriously contend that the Court was not justified in finding that a notice was served upon G. B. Quarles that the warehouse was attached pursuant to the writ of attachment because at the bottom of page 26 of Appellants brief it is said by Appellants in refering to the question as to whether the notice was served. "However this may be, it is appellants' contention that since the record clearly shows that the Sheriff did not take and retain custody or control of the property, either by himself or through the agency of any deputy or custodian, it must follow that there was no valid levy upon the property." It will thus be seen that the Appellants rely entirely upon the fact that the warehouse in question was personal property capable of manual delivery and could only be attached under Subdivision 3 of Section 6784 of the Idaho Compiled Statutes, which reads as follows, "personal property capable of manual delivery must be attached by taking it into custody." Further quoting from the Appellants

brief at page 27, "The method of attachment prescribed in subdivision 3 of Section 6784 is the exclusive method whereby personal property such as this warehouse could be validly attached and levied upon. This is the method, and the only method prescribed for the attachment of tangible personal property." This being the contention of Appellants, the fallacy of their argument is clearly shown not only by the plain language of our Statute under Subdivision 5, above quoted, but also by the construction placed upon such a Statute by the California Supreme Court and other cases in this brief cited.

The Sheriff's return on the attachment, among other things, (Rec. p. 65, Plaintiff's Ex. "G") states that, "I attached that certain building known as the wool warehouse, located on the right of way of the Gilmore & Pittsburgh Railroad Company, south of the tracks of said Company and Westerly from the Depot, in Salmon, Lemhi County, Idaho, the same being designated by plaintiff as personal property, levied upon as such and placed in the hands of H. G. King, as custodian."

While the said return does not in detail recite all that was done, the testimony of Sheriff Stroud and the admissions of G. B. Quarles shows that the notice that the property was attached, pursuant to the writ was actually served.

The fact that the Sheriff appointed a custodian to look after said property during the pendency of the attachment, while unnecessary where the attachment was made under Subdivision 5 of the Idaho Statute, above quoted, would be treated as an additional precautionary act and in no way affect the levy made under Subdivision 5, Sec. 6784, Idaho Compiled Statutes, Laughlin vs. Reed, 89 Me. 226, 36 Atlantic, 130.

It will be observed that in the case Laughlin et al, vs. Reed 89 Me. 226, 36 Atlantic 130, which involved the attachment of a building located upon leased premises, that the Statute provided that when personal property is attached, which by reason of its bulk or other special cause cannot be immediately removed, the officer may record the attachment in the office of the Clerk of the town in which the attachment is made, but when the attachment is made in an unincorporated place it shall be filed and recorded in the office of the Clerk of the oldest adjoining town in the County. In this case, the Sheriff, in addiiton to serving the writ and notice, as provided by the Statutes of Maine, as a precautionary measure, placed a keeper in charge of said building, and the defendant contended that the Sheriff was a trespasser abinitio for the reason that he unnecessarily placed a keeper in charge of said building. The Court, in determining whether or not the Sheriff was a trespasser by reason of the precautionary measure which he took in this attachment, held:

> "Prior to the enactment of this Statute, in order to perfect and preserve an attachment of such personal property, it was the duty of the officer, either by himself, or by a keeper appointed by him for that purpose, to 'take and retain possession and control of the property attached, or have the power to take immediate control'."
>
> This Statute did not deprive the officer making the attachment of the right to take actual possession of the property, if reasonably necessary for its preservation although the probability of its forcible removal might be very remote.
>
> Judgment for defendant.

The above case clearly decides that the fact that a Sheriff may take precautionary measures and do more in an at-

tachment proceeding than the Statute prescribes, still his action does not in any way invalidate the attachment made in compliance with the Statutes.

Appellants are in error in their statement at page 14 of their brief, to the effect that the defendant's theory when the attachment was levied, and throughout the case, was that the warehouse could only be validly attached by complying with Subdivision 3 of Section 6784 of the Idaho Compiled Statutes, for the reason that it appears from the record at pages 67 to 70 that the testimony of the Sheriff, T. J. Stroud, pertained largely to the fact that a notice was served upon G. B. Quarles that the warehouse has been attached pursuant to the writ of attachment. The record further shows at page 56 that G. B. Quarles testified before the Commissioner at Los Angeles as well as at the trial of the case with reference to the question of the service of the notice of attachment upon him that the warehouse was attached.

Under Specifications of Error No. 9, it is urged that the Court erred in deciding that H. G. King had such custody and control of the warehouse as required by the Statutes of the State of Idaho in order to constitute a legal and valid attachment of such property.

Even if we should concede for the purpose of argument that Appellants' view is correct, that the warehouse could only be attached by complying with Subdivision 3, Section 6784, Idaho Compiled Statutes, it is submitted that the Court was justified in view of the character of the property involved in finding that King was actual custodian of said property and that he retained the custody of the same. In this connection the testimony of Mr. King is undisputed to the effect that he was appointed custodian at the time the

attachment was made, which appointment he accepted, and at that time the Deputy Sheriff, Kirtley, gave him a key to the warehouse (Rec. p. 60). He further testified to the effect that during the time he was acting as custodian he was over to the warehouse a number of times; that he did not know of any person that had a key to the warehouse; that he never saw G. B. Quarles there during the time he was custodian; that on several occasions he actually went over to the warehouse and that he went there once or twice with Mr. Boomer's representative, Mr. Rodgers, and opened the door for Mr. Rodgers to permit him to take some supplies out of the warehouse which were being stored therein. Mr. King further testified to the effect that people were storing wool and taking it in and out of the warehouse; that he had a key and whoever was permitted to go in there he let them in when he knew they were entitled to go in and obtain their stuff (Rec. p. 61), and that he kept the warehouse locked when he was not present, and was by the warehouse every day when he was going to and from home. He stated that he knew Frank H. Haveman well; that Haveman never, at any time, attempted to dispute his right to the control and dominion over the warehouse, and that G. B. Quarles never disputed his (King's) right to the control or dominion over the warehouse, or anyone else (Rec. p. 62).

The testimony of Mr. King was taken in two separate depositions. The record of testimony of the first deposition is found at pages 60 to 63 of the Record. In his last deposition he explained some of the testimony given in his first deposition to the effect that when he testified in a former deposition, that he went by the warehouse substantially every day, he meant that he had to go by the warehouse approximately three times a day in going to and from home, either in his car or on foot, and that he traveled along Main Street, which is situated about two blocks from the

warehouse (Rec. p. 79), but that there are no buildings or any trees or obstructions to the view between the warehouse and Main Street where he passed, and that in going from his home the warehouse would be visible to him for five blocks (Rec. p. 81).

The fact that Mr. King was custodian of the property and recognized as such is borne out by the fact that the Sheriff, T. J. Stroud, testified that when he appointed Mr. Haveman as custodian under the forclosure proceedings, that Haveman was appointed keeper of the warehouse subject and subordinate to the duties of H. G. King as custodian under the attachment proceedings, and the further fact that the Sheriff stated that at the time that he served the papers of the foreclosure proceedings that he already had possession of the property under the writ of attachment and whatever was done was done subject thereto (Rec. p. 71). Mr. King was not at any time disturbed or interferred with in his possession or right as custodian of the warehouse. The mere fact that G. B. Quarles, the defendant, was permitted or did store and deliver certain wool that was in the warehouse during the time that Mr. King was acting as custodian would not, in view of the character of the property and the fact that Quarles recognized the validity of the attachment, be inconsistent with the custodianship of H. G. King. The property in and of itself being such that it could not be carried away or consumed by the use thereof in storing wool therein or delivering the same therefrom, would not require the same degree of actual seizure and custody on the part of the custodian as property which was capable of seizure and manual delivery and which might be taken away and destroyed or otherwise disposed of.

17 R. C. L. Sec. 78, P. 181.

The Court said in Young vs. Walker, 12 N. H. 502:

> "The mere fact, then, that the property is used by the debtor, would not seem to be enough to dissolve the attachment, so that another officer could acquire a lien upon it, particularly where he knew there was a subsisting attachment. The knowledge must, it is true, extend beyond the fact that the goods had been once under attachment. What act, what species of possession, and what degree of vigilance, will constitute legal custody, is often a question of difficulty, depending on a variety of circumstances, having respect to the nature and situation of the property, and the purposes for which custody and vigilance are required; and especially, to the notice of other officers, and persons having conflicting claims."

The same degree of strictness would not be required where the party questioning the validity of the attachment was the debtor, as in the present case, especially where such debtor at all times by his acts and conduct recognized the existence of the levy of the attachment.

Of course the contention of the appellants only become important in this case in the event that the Court should hold as a matter of law that the warehouse was personal property capable of manual delivery. If this Honorable Court should conclude as the trial Court concluded that the warehouse is personal property incapable of manual delivery then there is no merit to the appellants contention.

It is also suggested to your Honors that the appellants herein stand in no better position to question the validity of the attachment than G. B. Quarles. They claim their title to said warehouse through the foreclosure sale under the chattel mortgage in question. The chattel mortgage was given to secure the judgment which they had against their father, G. B. Quarles. By the terms of the mortgage it is provided that the mortgagee, H. L. McCaleb, Guardian

Ad Litem, did not waive the right of the judgment creditor, being the appellants herein, to share in the proceeds of the sale of any of the attached property in the suit of Citizens National Bank against Quarles. It is apparent, therefore, that the appellants herein had notice of the attachment by the terms of the chattel mortgage, and that their guardian ad litem, had full knowledge of the attachment against the warehouse. At the time the bill of complaint was filed the appellants were of age and by seeking to maintain this action they have fully ratified the acts of G. B. Quarles and their guardian ad litem. They could not accept the benefits and reject the burdens, so that in bringing this action the Appellants have clearly ratified the acts of their Guardian ad litem, H. L. McCaleb, and are bound thereby.

31 C. J. Sec. 55, p. 1013.

Having recognized the validity of an attachment, one may not thereafter object to it.

Lindsey vs. Mexican Crude Rubber Co., 197 Fed. 775.

Conduct of the defendant may make an otherwise invalid levy good by waiver or estoppel.

Jongewaard vs. Gesquire, 199 N. W. 585;

Tafts vs. Manlove, (Cal.) 14 Cal. 47;

Eisenbud vs. Crancimino, 69 N. Y. S. 672.

If a subsequently attaching creditor admits in his bill that an attachment has been issued at the suit of another creditor, levied, and the property placed in the custody of the law, such creditor is estopped to deny the validity of the levy.

Leo vs. Maxwell, 1 Hedd. (Tenn.) 365.

It is contended by Appellants on page 33 of their brief that neither the Sheriff nor Mr. King had any control, custody or possession of the warehouse at the time the chattel mortgage was given and prior and subsequent thereto. Yet the record is undisputed that on June 1, 1922, at the time the chattel mortgage was given, Quarles recognized at that time the lien of the attachment because in the mortgage that was made by him to H. L. McCaleb on the warehouse, he had a clause inserted to the effect that the giving of the mortgage did not waive the right of the judgment creditor, being H. L. McCaleb, Guardian ad litem, to share in the proceeds of the sale of any attached property. Moreover, on July 14, 1922, a month and a half after the execution of the mortgage in question, Quarles made and filed a motion in the Court in which the action was pending to discharge from the attachment the warehouse in question on the sole ground that the amount of property attached was excessive (Rec. pp. 65 and 66).

It is apparent that Quarles himself did not, during any of those times, consider that he had dominion over the warehouse. Furthermore, the order denying the motion to discharge the attachment was not made and entered until July 28, 1922, so that as late as July 28, 1922, the record shows conclusively that whatever use he made of the warehouse in the storing and handling of wool therein was done subject to and in recognition of the lien of the attachment.

According to Quarles' testimony (Rec. pp. 85 to 91), it will be seen that practically all his transactions concerning the storing of wool in the warehouse, about which he testified, occurred prior to July 28, 1922, at which time Quarles himself did not consider that he had dominion over the warehouse.

The absolute custody of the Sheriff of the warehouse in question is further borne out by the fact that when the warehouse was sold under execution in February of 1923, the warehouse was turned over to the purchaser by the Sheriff, who went into immediate, peaceable and absolute possession. At that time no attempt was made by Rose Loring Quarles, or anyone in her behalf, to question the right of the Sheriff to turn the property over to the purchaser at the sale, which was the Appellee in this action.

In conclusion we respectfully submit that the record and the authorities amply support the decision of the Trial Court and that the judgment herein made and entered should be affirmed.

Respectfully submitted,

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